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No. 10-190

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 2009

BILLY TORAIN,

Petitioner,

v.

AT&T Management Services LP et al.,

Respondent.

On Petition For a Writ of Certiorari
To the United States Court of Appeals
For the Seventh Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

Pursuant to 44.2, petitioner respectfully petitions the Court for rehearing.

ARGUMENT

I. THE SEVENTH CIRCUIT'S AFFIRMATION OF RES JUDICATA WITHOUT PRIVITYDENIED MR. TORAIN'S CONSTTUTIONAL RIGHTS.

This petition for rehearing results from the Seventh Circuit decision modifying the privity requirement for res judicata and subsequently denying Mr. Torain's right to due process (5th Amendment) and a jury trial. (7th Amendment) The petition asks the Court to decide the following:

> (1) Can res judicata be sustained in the absence of privity?; and (2) Would such a decision result in a denial of Due Process where a prior cause of action, deciding no material issues on the merits, is brought against joint tortfeasors who were not indispensible parties to the earlier litigation?

The district court dismissed Mr. Torain's claims stating "res judicata bars relitigation of any case where there has been (1) a final adjudication on the merits in an earlier action; (2) identity of the cause of action between the earlier and later suit; and (3) an identity of the parties or privies in the two suits." [1] (See Petition, p. A4) Subsequently the Seventh Circuit, in a *qualified*

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[1] Mr. Torain's first lawsuit in 2006 ("Torain1") was filed and dismissed against his ex-employer Ameritech Advanced Data Services of Illinois, Inc. ("AADS") (See *Petition* at p.A7) Subsequently he filed the present lawsuit in 2009 ("Torain2") against AT&T Management Services, LP., AT&T Operations Inc., AT&T Services Inc. and AT&T Teleholdings Inc. No issues were decided on the merits in Torain1 as litigation ended on procedural

decision, affirmed stating "Torain cannot prevail, whether or not the defendants in the current suit are in privity with the defendant in the first suit." (See *Petition* at p.A7) This decision modifies the criteria for res judicata, ignores the effect of joint tortfeasors and is inapposite to Court precedent.

> When "the binding force and effect of res judicata is challenged for want of due process, it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes." (See *Hansberry v. Lee*, 311 U.S. 32, 40, 61 S.Ct. 115, 117(1944) citing *Western Life Indemnity Co. v. Rupp*, 235 U.S. 261, 273, 35 S.Ct. 37, 40, 59 L.Ed. 220.)

The Seventh Circuit's "whether or not" language, akin to heads we win tails you lose, has no factual support in the record. Its decision, violative of Mr. Torain's Constitutional rights, does not comport with the fundamental notion of fairness consistent with the protections afforded by the 5th and 7th Amendments to the Constitution or decisions of the Court.

Constitutional due process requires the evenhanded application of the mode and procedures of the legal system so as to prevent the arbitrary exercise of governmental power[2]. The Seventh Circuit decision in Torain2 deprived Mr. Torain

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grounds pursuant to the Federal Rule of Civil Procedure ("FRCP") 41(b). Collateral Estoppel principles are inapplicable.

[2] "'[D]ue process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained, and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the

of a full and fair hearing on his property rights of employment against joint tortfeasors. The Court reasoned that "Property interests are not created by the Constitution, 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" See *Cleveland Bd of Education v. Loudermill*, 470 U.S. 532, 538 105 S.Ct. 1487, 1492 118, 84 L.Ed.2d 494 (1985) (citation omitted) Mr. Torain's *private sector* employment allegations are governed by 42 U.S.C. §1981 and as identified by the Court, modified by Congress via the Civil Rights Act of 1991 to add post-contract-formation conduct to the existing protections[3]. See *CBOCS West Inc. v. Humphries*, 553 U.S. 442, 128 S.Ct. 1951, L.Ed.2d 864 (2008) Due process requires the government to enforce all legal rights owed a person bringing Mr. Torain's employment rights within the protections of the 5th Amendment. Once Due Process applies "the question remains what process is due." See *Cleveland* at 561

The Court described "the 'root requirement' of the Due Process clause as being 'that an individual be given an opportunity for a hearing before he is deprived of any significant property interest,'" consistent with the nature of the case. *Id* at 542 Due Process was satisfied in Torain1 as that case was decided on the merits. (See FN1) Torain2 introduced four different corporate defendants[4] who never appeared at district court and claims based on the same transaction as Torain1. The district court decision never addressed the absence of facts supporting res judicata that deprived Mr.

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justice of the judgment sought." See *Hagar v. Reclamation Dist.*, 111 U.S. 701, 708, 4 S.Ct. 663, 667 (1884) (citation omitted)

[3] 42 U.S.C. §1981, enacted shortly after the end of the Civil War provides that "[a]ll citizens of the United States shall have the same right, in every State Territory, as is enjoyed by white citizens."

[4] Mr. Torain determined AT&T Teleholdings, Inc. to be the parent company of AADS and filed an amended complaint pursuant to FRCP 15(a) that was rejected.

Torain of his day in court. Because res judicata could not be sustained in the absence of privity, it was expected that the decision would be overturned on appeal. However, the Seventh Circuit stood by the unsupported analysis issuing an unclear decision that Mr. Torain loses "whether or not" privity is present resulting in denying Mr. Torain's rights to Due Process and a jury trial. This decision stands for bad law and would allow other courts to arbitrarily consider and apply portions of established law piecemeal and separate from the facts of the case.

II. PRECEDENT ALLOWS JOINT TORTFEASORS TO BE SUED SEPARATELY.

The Seventh Circuit decision was directed at "protecting" its decision in Torain1 and not placing any significant effort in producing a factually supported rationale for its conclusion in Torain2. The Seventh Circuit could not have contemplated that its posture was fair, in the absence of the new defendants appearing in court and no showing of *any* evidence of privity. Its statement that "if the requirements for 'piercing' are not met, then it is impossible to understand how one business could be held liable for another's wrongful discharge," is careless. Mr. Torain argued that neither the preclusion doctrines collateral estoppel and res judicata nor veil piercing, virtual representation or *stare decisis* barred Torain2. He was not required to bring suit against the present defendants in Torain1 as they were joint tortfeasors. "It has long been the rule that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit." (See *Temple v. Synthes Corp. LTD.*, 498 U.S. 5,7 111 S.Ct. 315, 316 (1990) citing *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 329-330, 75 S.Ct. 865, 869 (1955); and *Bigelow v. Dominion Copper Mining & Smelting Co.*, 225 U.S. 111, 132, 32 S.Ct. 641, 644 (1912)) The Seventh Circuit decision disregards

consideration of joint tortfeasors and the difficulty of determining who to bring to court when facing a large corporate defendant.

III. THE SEVENTH CIRCUIT AFFIRMATION WAS IN ERROR AS IT MISAPPLIED RES JUDICATA.

The Seventh Circuit *suggests* two reasons justifying denial of Mr. Torain's claims; (1) the current defendants are in privity with the defendant in Torain1; and/or (2) the defendants are a single employer. (See *Petition* at p.A7) In addressing item "2" the only way the Torain1 and Torain2 defendants could be a single employer is if the corporate veil was pierced and all of the associated corporations were found to be successors, predecessors assigns etc. Contrary to the Seventh Circuit's decision, Mr. Torain argued that "There was no discussion of corporate veil piercing or invocation of alter ego doctrine that found AADS and the current defendants to be treated as a single enterprise...and no evidence gleaned from the record that supports a reasonable conclusion of privity." This statement is unambiguous and yet the Seventh Circuit attributed the exact opposite "belief" to Mr. Torain to bolster its inadequate argument.

Similarly the res judicata requirements are well established by the Court stating "under the doctrine of res judicata, a judgment 'on the merits' in a prior suit involving the same parties or their privies bars a second suit based on the same cause of action. (See *Lawlor* at 326; 867) Contrary to the Seventh Circuit's posture that Mr. Torain loses "whether or not" privity were present, if privity were not present Mr. Torain must be allowed to litigate his claims. The defendant holding company AT&T, Inc. has 50 – 150 subsidiaries and an extremely complex management structure whereby the chain of command for Mr. Torain was *not vertical* and overlapped with the current defendants who, while sister subsidiaries and

joint tortfeasors, were neither (1) the parent company of AADS; (2) indispensible parties to the prior litigation nor was their liability dependent upon AADS. Mr. Torain properly sought to hold the current defendants liable for their *direct* actions that combined to deprive him of his employment and the Seventh Circuit committed error in affirming the otherwise unsupported district court decision. The appellate courts are not allowed to arbitrarily modify res judicata requirements to clear their dockets.

If privity is not found or not *considered*, then res judicata cannot be supported and the Seventh Circuit's ad hoc application of the required law either carelessly or intentionally deprived Mr. Torain of his 5th and 7th Amendment rights in the interest of judicial expediency.

IV. CONCLUSION

For the foregoing reasons, the petition for rehearing should be granted, the district court dismissal vacated and the matter remanded for further proceedings.

Date: November 8, 2010

Respectfully Submitted,

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CERTIFICATE

Petitioner hereby certifies that this petition for rehearing is meritorious and presented in good faith and not for purposes of delay and that the total word count for the petition for rehearing is One Thousand Seven Hundred and Thirty-Six words.

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